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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

SUPREME COURT
STATE OF COLORADO

Case No. 84SA400

December 2, 1986

LANDMARK LAND COMPANY, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP. and
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER; THE CITY COUNCIL
OF THE CITY AND COUNTY OF DENVER,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, INC.,
and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

Case No. 84SA410

HARSH INVESTMENT CORP.,
Plaintiff-Appellant,

and

LANDMARK LAND COMPANY, INC., and
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER; THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, and its members, CATHY REYNOLDS, ROBERT CRIDER, WILLIAM A. SCHEITLER, T.J. HACKWORTH, M.L. SANDOS, PAUL A. HENTZELL, PAUL L. SWALM, JOHN J. SILCHIA, EDWARD F. BURKE, JR., KING M. TRIMBLE, SALVADORE CARPIO, CATHY DONOHUE, WILLIAM R. ROBERTS; THE HONORABLE WILLIAM H. MCNICHOLS, JR., MAYOR OF THE CITY OF DENVER; THE BUILDING DEPARTMENT OF THE CITY AND COUNTY OF DENVER, and JACK TANIGAWA, ACTING DIRECTOR OF THE BUILDING DEPARTMENT OF THE CITY AND COUNTY OF DENVER,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, INC., and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

Case No. 84SA413

SOUTHMOOR PARK SHOPPING, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP. and
LANDMARK LAND COMPANY, INC.,
Pliantiffs,

v.

THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, a Municipal Corporation, and THE CITY AND COUNTY OF DENVER, STATE OF COLORADO,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, INC. and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

Appeals from District Court, City and County of Denver
Honorable Warren O. Martin, Judge

EN BANC JUDGMENT AFFIRMED

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JUSTICE ROVIRA delivered the Opinion of the Court.

JUSTICE DUBOFSKY does not participate.

These three cases, which were consolidated before trial, all involve challenges to section 10-62.5 of the Revised Municipal Code of the City and County of Denver [Code], which extended mountain view protection to Southmoor Park in 1982. The three appellants, Harsh Investment Corp., Landmark Land Company, Inc., and Southmoor Park Shopping, Inc., own land in the area affected by section 10-62.5. They brought suit against the City and County of Denver alleging substantive, procedural, and constitutional defects in the ordinance. The trial court, hearing the case without a jury, held the ordinance was valid and dismissed all of the appellants' claims. The appeal comes directly to this Court because of the constitutional questions involved. § 13-4-102(1)(b), 6 C.R.S. (1973). We affirm the judgment of the trial court.

I.

The appellants have for years owned land in southeast Denver in an area bounded by Interstate 25 on the west, Hampden Avenue on the north, and Monaco Boulevard on the east. Much of this land is currently being utilized as commercial property, and the zoning classification covering it, B-3,[1] allows both residential and business (including office high-rise) use. Code §§ 59-306 *et seq.*

In 1980, Landmark announced plans to build a 21-story office building on its land, which the applicable zoning ordinance allows. No building permit was ever obtained by Landmark. The building proposal distressed many of the residents in the area, and, as a result, a neighborhood association, Southmoor Park East Homeowners Association, Inc., (SPEHA) opposed the proposed high rise development. Among other things, SPEHA submitted both rezoning and downzoning proposals for the area. After the enactment of section 10-62.5, the zoning proposals were withdrawn.

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[1] The land of appellants Landmark and Southmoor Park Shopping is zoned B-3; the land of appellant Harsh is zoned R-4.

Section 10-62.5 itself was offered to the city council, through a councilman, at SPEHA's suggestion. The Denver Planning Board recommended against it; nonetheless, the city council adopted section 10-62.5 on July 19, 1982. No record of the discussion or enactment, other than the voting tally sheet, exists from the public hearing that was held.

Section 10-62.5 is an amendment to Denver's Mountain View Ordinance. Code §§ 10-56 *et seq.* (1986).[2] The amendment, with an incorporated map, covers several hundred lots in addition to the appellants' land. It provides maximum height for buildings on the west side of Southmoor Park, allowing more height the farther the buildings are located from a specified reference point within Southmoor Park.[3]

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[2] The Mountain View Ordinance was originally passed in 1950. It is based on findings by the city council that the mountains were part of Denver's "unique environmental heritage" and that protection of mountain views would promote aesthetic enjoyment, tourism, and civic pride

The original ordinance protected the mountain view from five city parks. It was amended in 1983, adding two other parks to the list of protected view areas.

Since section 10-62.5 is simply an amendment to the original ordinance, the council did not need tc restate the reasons that mountain views are deserving of protection in the amendment itself; those reasons are implicitly incorporated into the amendment.

[3] The amendment provides, in part,

> (a) *Adoption of map.* The attached map shall be and hereby is approved and adopted . . . .
>
> (b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level plus two (2) feet for each one hundred (100) feet that said part of a structure is horiziontally distant from the reference point. . . .
>
> (c) *Reference point.* The reference point is a point having an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level . . . .

Code § 10-62.5.

However, there is an exception that allows a height of forty-two feet for any structure in an area zoned for business covered by the amendment. Code § 10-62.5(d)(1).[4] Subsection (d)(2) provides an exception for existing structures and also allows existing structures to be rebuilt to their present height if they are damaged or destroyed.

The appellants' complaints allege that the amendment was without basis in law and arbitrary, and therefore void. The complaints further state that the amendment substantially impairs the rights of the appellants, and, if valid, constitutes a taking requirement compensation. The appellants also request a permanent injunction restraining the city from enforcing the ordinance.

At trial, the court heard evidence on the procedure the city council had used in adopting the amendment. Although not required by law to do so, the council called a public hearing. Representatives of SPEHA and the appellants spoke. Representatives of the appellants had also voiced their concerns to the Denver Planning Board. The trial court also heard evidence on the amendment's effect on the mountain view, as well as its effect on the value of appellants' property.

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[4] As originally adopted, subsection (d)(1) provided a forty-two foot maximum for all structures in an area covered by § 10-62.5 and zoned for business. The city council changed subsection (d)(1) in July, 1984 (after the complaint had been filed, but before the trial had commenced), to provide, "[w]ithin any district zoned for business a structure[,] which[] under the terms of section 10-62.5 would be limited, may be constructed to a height of forty-two (42) feet above the natural grade." The trial court interpreted the amendment to allow structures in a business zone a height of forty-two feet or the height allowed by the gradation provided in subsection (b), whichever is higher. Although the change was noted in a stipulated pretrial order, the complaints were not amended to reflect the change. However, under either version of the ordinance, Landmark's proposed building is limited to considerably less that the twenty-one stories it wishes to build.

The trial judge viewed each of the parks covered by the ordinance and made an express finding that there was a "panoramic mountain view" from the sighting point in Southmoor Park. He held that the amendment was a valid exercise of police power and, although it substantially diminished the value of appellants' property, it did not take all value. Accordingly, the trial court dismissed all appellants' claims.

II.

The threshold issue is whether, in enacting the ordinance, the Council was acting in a legislative or in a quasi-judicial capacity. The city concedes that the procedures that must accompany quasi-judicial activity were not performed; therefore, if this amendment is quasi-judicial in nature, it must be overturned.

Denver's characterization of this amendment as legislation is not binding on this court. *City and County of Denver v. Eggert*, 647 P.2d 216 (1982). *Eggert* reaffirmed that,

> [i]n order to support a finding that the action of a municipal legislative body is quasi-judicial, all of the following factors must exist: (1) a state or local law requiring that the body gave adequate notice to the community before acting; (2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law.

Snyder v. City of Lakewood, 189 Colo. 421, 425, 542 P.2d 371, 374 (1975).

In the case at bar, none of these tests are met. No state or local law requires a public hearing, notice

thereof, or an on-the-record determination by the city council. The fact the the city voluntarily held a hearing does not satisfy the test. *Margolis v. District Court*, 638 P.2d 297, 303 (1981) (dicta).

Further, this amendment fits squarely into our description of legislative action: it is prospective in nature, of general application, and requires the balancing of questions of judgment and discretion. *See Eggert*, 647 P.2d at 222. It does not pertain only to the immediate parties, as quasi-judicial acts typically do, *Eggert*, 647 P.2d at 222-23, but rather involves judgment based on possible future facts and is binding on all land that it affects, not just the land of appellants here.

A point could be reached where the 'legislation' is so narrow, so directly pointed at certain individuals, and so intertwined with an area that is usually judicial in nature that it would be quasi-judicial in character, even though it could satisfy the *Snyder-Eggert* test. However, this amendment, which is prospective, affects hundreds of lots and landowners, and concerns an area usually governed by legislation, does not reach that point.

We conclude this amendment is legislative in nature; thus the lack of quasi-judicial procedure does not invalidate it.

III.

Once it is established that the amendment is legislation, a presumption of constitutionality attaches; this presumption can only be overcome by proof beyond a reasonable doubt. *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 4, 543 P.2d 715, 717 (1975). Appellants have raised several arguments regarding the constitutionality of the amendment, but none establish that it is unconstitutional beyond a reasonable doubt. Absent fraud or clear abuse of discretion, the judicial branch should not interfere with legislative actions. *McCray v. City of Boulder*, 165 Colo. 383, 390, 439 P.2d 350, 354 (1977).

A.

Appellants' first assault on the constitutionality of section 10-62.5 stems from their characterization of the amendment as special legislation. Special state legislation is invalid, Colo. Const. art. V, § 25, and this prohibition has long ago applied to municipalities. *See City and County of Denver v. Bach*, 26 Colo. 530, 58 P. 1089 (1899). The amendment constitutes special legislation, in appellants' view, because it turns control of appellants' land over to SPEHA, and it includes an exception for already existing structures.

The claim that the City Council has turned control of appellants' land over to SPEHA is without merit. While SPEHA proposed and lobbied for the amendment, it was passed by the city council. Holding that the council thereby abdicated its responsibilities would defeat the entire purpose of having a republican form of government; i.e., for a legislature to evaluate competing interests and determine what was the best course of action based on those different interests.

Similarly, leaving exceptions for existing structures—and allowing them to be rebuilt to their current height if destroyed—merely represents a legislative determination that the view is now acceptable, but is not to be further derogated. Such nonconformance exceptions are common in other areas of land use regulation, such as zoning, and have been upheld. *See, e.g., Board of County Comm'rs of Boulder v. Echternacht*, 194 Colo. 311, 572 P.2d 143 (1977).

B.

Appellants' next constitutional attack claims that the amendment is neither rationally nor reasonably related to a legitimate public purpose.

It has been well established that protection of aesthetics is a legitimate function of a legislature. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954). Especially

in the context of Denver—a city whose civic identity is associated with its connection with the mountains—preservation of the view of the mountains from a city park is within the city's police power.

Appellants argue that SPEHA's reason for promoting the amendment was to protect the property values of its members' homes, not to protect the mountain view. Assuming that this is true, it does not affect the validity of the city council's action. The council enacted an amendment that is clearly directly related to preserving the mountain view—indeed, the gradations in allowable height based on distance from the sighting point are tailored to nothing else.

The forty-two foot exception, equal to approximately three commercial stories, also reflects a balancing of interests involved. Appellants may continue their present use of the land or change to another use, so long as their structures do not interfere with the view plane established by city council.[5] The ulterior motives of SPEHA are of no relevance.

C.

Appellants argue further that, even if the protection of the mountain view is a legitimate purpose, this must be accomplished by a formal rezoning. Once it is settled that protection of aesthetics is a legitimate function and it is clear that this amendment is related to that goal, the city is free to choose the method of implementing

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[5] With no record of council's deliberation, the forty-two foot height might appear to be arbitrary. However, the presumption of constitutionality attaches to this figure as well as the rest of the amendment. Appellants have not carried their burden of establishing that there is no rational basis for this exception. It is apparent, especially in light of the city council's amending of this provision two years after the adoption of section 10-62.5, that the height reflects a legislative decision on the best balance between the desire to promote commercial activity and the desire to protect the mountain view.

that goal, within the constitutional parameter that the enactment is not arbitrary or capricious.[6]

We upheld nonzoning restrictions on the use of property when the concern was a combination of health and aesthetics in *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 543 P.2d 715 (1975). There, a city ordinance required fencing around garbage containers and perimeters of multi-resident dwellings; we stated,

> [A] city may—in the exercise of that power—restrict the use of property in a manner that is not arbitrary or unreasonable and that bears a substantial relationship to a legitimate government concern.

190 Colo. 1, 4, 543 P.2d 715, 717 (1975). There is no reason to depart from this analysis simply because the "legitimate governmental concern" is slightly different here than in *Mosgrove*. *See also Collopy v. Wildlife Commission*, 625 P.2d 994 (Colo. 1981) (nonzoning restriction on property use upheld against constitutional attack).

Denver has other ordinances that restrict use, bulk, or density (the traditional zoning considerations) through methods other than zoning ordinances. *See, e.g.*, Code §§ 10-81 *et seq.* (restriction on structures in the civic center area); Code §§ 3-21 to 3-25 (restrictions on outdoor advertising along the South Platte River). Also, the state legislature has passed statutes controlling aspects of urban living that are usually regulated by local zoning ordinances. *See, e.g.*, § 25-12-101 et seq., 11 C.R.S. (1982 & 1986 Supp.) (noise abatement requirements).

Other states have allowed nonzoning height restrictions in an effort to protect aesthetics. *See, e.g., Polygon Corp.*

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[6] The city, of course, must also follow its own procedures. If this had been a zoning or rezoning, the city would have been bound by the procedures outlined in the city charter. *See Western Paving Construction v. County Comm'rs of Boulder*, 181 Colo. 77, 506 P.2d 1230 (1973).

v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978) (building permit for 13-story building, which complied with all applicable zoning laws, denied due to adverse (primarily visual) environmental concerns); *State of Washington, Dept. of Ecology v. Pacesetter Construction Co.*, 89 Wash. 2d 203, 571 P.2d 196 (1977) (nonzoning ordinance limiting buildings to 35 feet for aesthetic reasons upheld); *Piper v. Meredith*, 110 N.H. 291, 266 A.2d 103 (1970) (nonzoning height restriction based on aesthetics upheld); *Brougher v. Board of Public Works*, 107 Cal.App. 15, 290 P. 140 (1930) (nonzoning height restriction upheld despite landowner's contention that restrictions on height had to be enacted through zoning).

We conclude this amendment, aimed at protecting the view of the mountains from a city park, is substantially related to a legitimate governmental concern. The fact that the same goal might have been accomplished through other means does not alter this conclusion nor invalidate the restrictions.

D.

Appellants' final constitutional argument is that section 10-62.5 constitutes a taking of private property without just compensation.

It is the well-settled rule in Colorado that in order to establish that an ordinance which restricts the use of land is unconstitutional, it must be shown that the "ordinance precludes the use of [the] property for *any* reasonable purpose. [Citations.]" *Ford Leasing Development Co. v. Board of County Commissioners*, 186 Colo. 418, 426, 528 F.2d 237, 241 (1974) (emphasis in original); *see also Madis v. Higginson*, 164 Colo. 320, 434 P.2d 705, (1967) (due process and just compensation clauses of the Federal and State constitutions do not require that landowner be allowed to make the most profitable use of his property).

Appellants cannot meet this test as their present use of their land may continue under the amendment. They attempt to find a constitutional taking by distinguishing the cases requiring deprivation of all beneficial use of property and arguing that those cases involved a landowner bringing suit to change the zoning ordinance as it existed when the land was purchased.

Such a distinction is unpersuasive. Unless the owner has already established a use allowed under the previous ordinances but not allowed under the 'new' ordinances, the chronology of events is irrelevant. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (upholding nonzoning land use restraint; "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . ."); *see also Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding law prohibiting landowner from continuing his otherwise lawful operation of a brickyard); *cf. Westwood Meat Market v. McLucas*, 146 Colo. 435, 361 P.2d 776 (1967) (same power that authorized zoning ordinances authorized modification of same unless vested rights affected).

The judgment of the trial court is affirmed.

JUSTICE DUBOFSKY does not participate.

APPENDIX B

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 82CV-6715, Courtroom 9

LANDMARK LAND COMPANY, INC.,
HARSH INVESTMENT CORP., and
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION and
THOMAS P. MCCALLIN,
Intervenors-Defendants.

REPORTER'S TRANSCRIPT—August 15, 1984

The above-entitled matter came on this date before the HONORABLE WARREN O. MARTIN, District Judge, presiding in Courtroom Nine of the District Court.

APPEARANCES:

CHARLES E. NORTON—For Plaintiff Landmark
SUSAN E. BURCH

JEFFREY A. CHASE—For Plaintiff Harsh

JOSEPH J. BRONESKY—For Plaintiff Southmoor

ROBERT M. KELLY—For Defendants

JAMES M. LYONS—For Intervenors-Defendants

[2] PROCEEDINGS

(WHEREUPON, at 11:17 o'clock, a.m., court was reconvened with all parties present, and the following proceedings were had:)

THE COURT: Okay, this case concerns the validity of the Southmoor Park Mountain View Ordinance. This ordinance, which was adopted in July of 1982, provides in general that structures shall not be constructed which will block a mountain view from a point on the east side of Southmoor Park. It establishes a view plane from a point in the Park. It provides, as do the other mountain view ordinances, for a rise of the plane, and in this instance it provides that for each one hundred feet distance from this point a two foot rise in the plane. It also provides, in spite of this restriction, that within areas zoned for business a structure can be built at least to forty-two feet. As I construe it, it means that the ordinance provides for in business places that it can be at least forty-two feet unless the plane is higher, in which case it will be the higher limit. The ordinance further provides that existing structures can be rebuilt to the same height they are at the present.

The parties to this case are Landmark Land Company, Inc., plaintiff. Landmark is the owner of land bordered by [3] Monaco Boulevard and Valley Highway. Located on its property at the present time is the Continental Theater and an ice rink. These properties are located to the north of what was Jefferson Avenue. Landmark also owns land to the south of Jefferson Avenue, which is a substantial piece of land and presently vacant.

Harsh Investment Corp., another plaintiff, is the owner of the Howard Johnson Motel. Located also on this property is a restaurant and gasoline service station.

The third plaintiff is Southmoor Park Shopping, Inc., which is the owner of a shopping center located just east of the motel on Hampden Avenue.

All of these properties lie to the south of Hampden and to the east of the Valley Highway.

The defendants are the City and County of Denver and various of its officials.

Intervening as defendants are the Southmoor Park East Homeowners Association and Thomas M. McCallin. Southmoor Park Homeowners Association is a nonprofit corporation. Its members are people who reside in the Southmoor Park subdivision to the east of the Valley Highway. Mr. McCallin was an owner there and a member of the association.

The neighborhood is such that to the east of Monaco Boulevard in this area are single-family residences. The park itself is located on Poplar Street. That's about the [4] east margin of the park.

The factual background is this:

In the fall of 1981 Landmark took to the planning office of the City and County of Denver a preliminary plan of some kind to do construction on the land owned by it. The plans called for a twenty-one-story office building. The plan was to tear down the existing structures of the Continental Theater and the ice rink, to build a four-screen theater on Monaco Boulevard and place the office tower to the west of Monaco Boulevard in some location which I am not sure of because nobody has put in evidence what was submitted to the planning office.

This submission to the planning department became known to the Southmoor Park East Homeowners Association. They were unhappy with having a twenty-one-story office building constructed in their neighborhood. They were concerned about a number of things such as traffic and crime and perhaps also mountain view. They undertook to see if they could prevent the building of this office structure.

Among the things they did was to oppose the vacation of Jefferson Avenue, which was necessary under that particular plan. Thev also sought on two occasions to

have the property owned by Landmark downgraded in zoning. They were not successful in these efforts.

Then they came upon the idea somehow of getting [5] City Council to pass a mountain view ordinance which would in effect prevent the building of a structure of this height on the Landmark property. This was passed by City Council in July of 1982.

Prior to that this was considered by the planning office personnel. It was the recommendation of the planning office personnel that this mountain view ordinance not be passed. It was considered by the planning board by an eight to one vote. The planning board recommended that City Council not enact the ordinance. Nevertheless, City Council did, by a nine to three vote, enact the ordinance.

The question to be determined today is whether or not this ordinance is legal or illegal.

The first question is essentially a procedural one presented. And the issue is whether the action taken by City Council was quasi-judicial in nature or quasi-legislative in nature. It's not an issue that I've had much trouble with.

It does seem to me if City Council had undertaken to zone only the Landmark property or Landmark had gone in and asked for B-4 zoning that this is the kind of zoning that requires judicial action by City Council. On the other hand, if City Council passed an ordinance saying no wooden structures shall be built in the whole City of Denver, that's clearly legislative because it affects lots of people. And this seems to be the plain test in determining whether it's [6] judicial or legislative is how many people, how large of an area is involved.

It's clear to me that there are several hundred properties affected by the mountain view ordinance in this case both on the east side and the west side of the Valley Highway, many businesses as well as many residential properties. So it's been clear to me from the beginning that this was legislative action on the part of City Council and not judicial action. So they were not required to

go through all those procedures required of them when they're acting judicially. It's also clear if I'm wrong on that then City Council did not do those things necessary and it's acting in a judicial capacity.

All right, it seems to me there are essentially two questions involved, and that first one I've just cited. And the second one is whether or not the City properly exercised its police power in enacting this ordinance. Now in this connection, of course, plaintiffs have to make some showing that they are interested in this ordinance.

The vice-president of Landmark Land has testified that his property is worth substantially less with the mountain view ordinance than it was without it. Basically he said that office space in highrise offices could rent for more than office space in lowrise office buildings.

And officer from Harsh Investment Company, owners [7] of the motel, testified that his land was worth considerably less, perhaps nine million dollars less, and that they could not build as much building on this property as otherwise.

Mr. Van Holt Garrett, on behalf of Southmoor Park Shopping Center, has testified that his property is likewise worth less.

This testimony is undisputed. And we're not here to decide today how much less each of the properties is worth, but it seems to be undisputed that each of these properties is worth less than it was before adoption of the ordinance. And so I do make that finding and that the amount less is substantial in each instance.

Now it's clear to me that these three plaintiffs are not the only ones affected adversely by this ordinance. There are other businesses involved in the view plane and there are, of course, numerous residential properties involved; and all of those people are likewise affected by the ordinance.

It's also clear that there was not a complete taking of the three plaintiffs' properties. Their properties are still very valuable. As far as Harsh is concerned, we have

testimony it's worth six million dollars after passage of the mountain view ordinance. So it was not a complete taking of any property rights they have there. They still have very valuable property, and it will continue to be [8] valuable in the future.

Now I'm not sure what category they're arguing about, presented by plaintiffs, concerning following what the zoning requirements come under. But in any event, it's been raised as an issue that the City should have followed its own charter requirements and ordinance requirements in passing the mountain view ordinance because in effect it's a zoning ordinance. And I find against the plaintiffs on that issue.

It does seem to me that the City has a right to pass a separate mountain view ordinance without following the charter and ordinance requirements on zoning. The City has done this, as has been pointed out, on flood plane statutes and ordinances relating to flight patterns in Stapleton Airport. And the distinction that is sought to be made by plaintiffs is because this has to do with aesthetics and not health and welfare.

And I certainly agree with plaintiffs that when a new police power is recognized by courts, why, they tend for a few years to be more restrictive with these newly recognized police powers than they are with something that affects life or death. But a gradual process goes on in which the new police powers, in this case protecting views of the mountains, this process goes on so that these views are accorded the same rights to the government bodies as are accorded for something affecting flood planes.

[9] So I am unable to see any distinction between the right to enact mountain view ordinances and the right to enact flood plane ordinances. If I'm wrong that the zoning procedure should have been followed by City Council, by the rest of the government, why, then it's clear that these zoning procedures were not followed.

Basically there are two attacks on the police power in this case. One attack certainly relates to mountain view ordinances as a whole, and the second one relates to this particular mountain view ordinance.

And let me state that it's clear from the appellate courts that they don't think courts have a very large role to play in these things. And generally these matters are decided by the legislative body and the executive body and that the courts get involved in deciding these matters only in unusual circumstances, at least in overruling the legislative and executive bodies.

Now as far as mountain view ordinances in general, as stated by plaintiffs, the question is whether there is a rational relationship to any legitimate government purpose or interest. And so I think it's clear that in other parts of the country, why, view ordinances have been upheld. Certainly California. And it does seem to me that it is a legitimate government interest and purpose to protect views of mountains from Denver parks. And so I'm ruling that there [10] is the rational basis and that mountain view ordinances in general are valid.

Now the parties have stipulated that I go look at some parks where there are mountain view ordinances. If I can find my notes, I'll tell you what I saw.

Okay, as far as Ruby Hill Park is concerned, there's a mountain view ordinance in Ruby Hill Park, which is located at West Florida Avenue near South Osage Street. And I drove up to the top of the park, and there's a spectacular view in all directions from there—it's probably the best view of any of the parks—including a panoramic view of the mountains. There is another hill off to the southwest there on which the KVOD tower sits which does block some of the view to the west. And there are some foothill views blocked off to the west by three different highrise buildings. But as far as the tops of the mountains are concerned, why, there is nothing blocking them. There are some power poles and some high power lines which cross the view. They can be seen through. The

topography is such that there is a slope downward to the west.

Okay, State Home Park is located at East Iliff and South Emerson Street, apparently down in Harvard Gulch there. There is a little sign there near the pro shop designating the point from which the view is. The view is mostly straight to the west there, and trees to the north and south [11] block off a good bit of the view. So there's only a few degrees view either direction from this point. And some foothills views are blocked by Loretta Heights' big building out there and the Public Service smokestacks down on the river. The view's very nice but limited in range.

I went to Washington Park this morning.

Well, let me say as far as State Home Park the topography does slope downward to the west, although the Platte River is there.

At Washington Park theoretically there's a view. As a practical matter it's mostly blocked by trees this time of year.

And as to all the parks, any time you stand behind an evergreen tree you're not going to have a view. So I don't consider the vegetation as far as this particular view is concerned very significant.

It is possible to see some of the mountains from some locations from Washington Park.

Cheesemen Park. I didn't go over to the flag pole up between York and Josephine. I went this morning to the pavilion up there, and there is a nice view. And it's clear from looking that the Cheeseman Park View Ordinance affects an awful lot of people because the land to the west there—and there's nothing in the record but I'll state what I know—that land's zoned R-3 and R-4. And it's clear that [12] the ordinance affects lots of owners of land to the west of Cheeseman Park. And as to the desirability of mountain view ordinance, certainly that can be determined by looking west from the pavilion

because Bal Swan's highrise apartment building certainly sticks up like a sore thumb there.

As far as Southmoor Park is concerned, the photographs don't really depict very well the topography of the park itself. The high point is there along the left side of the photograph, and the park line drops over very sharply into a hole. As a matter of fact, it doesn't really look that steep in the photograph. And there is, I determine, a panoramic mountain view. I'm surprised because it doesn't really show very well in the photograph. But you can see all the way to Long's Peak and a long way south. The trees off to the south block Pike's Peak from the view, but there is a view of a lot of the mountains from that elevation of the park. Now as you go downward, why, you lose the view because it drops off so much. The topography of the land to the west of Southmoor Park is different than that of almost all the other parks in that some land lying to the west there is higher than the highest point of the park, and Southmoor Park is different in that respect.

Now the question is whether or not—well, let me say as far as the purposes set forth in ordinance 10-56, they are sufficient to allow adoption of the mountain view [13] ordinances. If those purposes are met, then the mountain view ordinance in my view is legal.

Now as far as whether all these purposes were met in Southmoor Park, why, it is questionable, as some of the witnesses have testified to, whether or not there is an attraction to tourists and visitors. I do notice that the individual defendant in his deposition did testify that he takes visitors and tourists over there from his house, but clearly it's not a big tourist attraction in Denver. And it does seem to me that on the whole the purposes set forth in ordinance 10-56 were met by 10-62.5, the Southmoor Park ordinance. So it does seem to me that the City Council and the Mayor properly exercised their police power in this case.

It may well be that I would have decided to vote differently in this case. Certainly the economic hardship to the plaintiffs in this case is substantial. And it may be one of those cases where these people don't have very many votes and the Southmoor Park East Homeowners Association has several hundred. Perhaps that was the motive for passing the ordinance. But in any event, I cannot look behind their motives or the reasons why City Council voted that way; and my role, limited role, is simply to decide whether the police power was properly exercised in this case. I determine that it was exercised properly.

So plaintiffs' complaint is dismissed.

[14] And will somebody on the defense side do a written order. You don't need to do findings or anything, just a written order.

Okay, anything I haven't decided I'm supposed to? I don't think I have to decide anything about estoppel since it wasn't raised or eminent domain since we don't get that far.

Okay, we'll be in recess.

MR. KELLY: Thank you, Your Honor.

(WHEREUPON, this trial was concluded).

* * * *

[15] CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, WESLEY P. MEGILL, Certified Shorthand Reporter in and for the State of Colorado, do hereby certify that I was the Official Court Reporter for Courtroom Nine, Denver District Court, on August 15, 1984, and that the foregoing transcript, pages 1 through 14 inclusive, being that portion requested by ordering counsel of the trial held on said date in Civil Action No. 82CV-6715, LANDMARK LAND COMPANY, INC., et al., vs. THE CITY AND COUNTY OF DENVER, et al, and SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, et al, is true and correct.

Dated at Denver, Colorado, this 16th day of August, A.D., 1984.

/s/ Wesley P. Megill,
WESLEY P. MEGILL, CSR

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

Case No. 82CV6715

Courtroom 9

LANDMARK LAND COMPANY, INC., *et al.*,
Plaintiff,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendant.

ORDER

Judgment is entered in favor of defendants and against plaintiffs. The complaint is dismissed with prejudice. Defendants are to recover their costs.

This judgment replaces the one signed by the Court on August 23, 1984.

cc: Jeffrey A. Chase, Esq.
Robert M. Kelly, Esq.
James M. Lyons, Esq.
Charles E. Norton, Esq.
Joseph J. Bronesky, Esq.
Jane Ann Murphy, Esq.

DATED August 28, 1984

BY THE COURT:

/s/ Warren O. Martin
Judge

APPENDIX D

SUPREME COURT
STATE OF COLORADO

Case Nos. 84SA400, 84SA410 and 84SA413
Appeals, District Court, Denver County

LANDMARK LAND COMPANY, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP., *et al.*,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, *et al.*,
Intervenors/Defendants-Appellees.

HARSH INVESTMENT CORP.,
Plaintiff-Appellant,

and

LANDMARK LAND COMPANY, INC., *et al.*,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, *et al.*,
Intervenors/Defendants-Appellees.

SOUTHMOOR PARK SHOPPING, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP., *et al.*,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, *et al.*,
Intervenors/Defendants-Appellees.

ORDER OF COURT

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions shall be, and the same hereby are, denied.

BY THE COURT, EN BANC, DECEMBER 22, 1986.
JUSTICE DUBOFSKY does not participate.

cc: Susan E. Burch, Esq.
Charles E. Norton, Esq.
1700 Lincoln Street, Suite 3800
Denver, CO 80203

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Denver, CO 80202

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Marla Music, Esq.
633 17th Street, #2900
Denver. CO 80202

[SEAL]

APPENDIX E

SUPREME COURT
STATE OF COLORADO

Case Nos. 84 SA 400, 84 SA 410 and 84 SA 413

LANDMARK LAND COMPANY, INC.,
HARSH INVESTMENT CORP.,
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs-Appellants,

v.

THE CITY AND COUNTY OF DENVER, THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, and its members, CATHY REYNOLDS, ROBERT CRIDER, WILLIAM A. SCHEITLER, T.J. HACKWORTH, M.L. SANDOS, PAUL A. HENTZELL, PAUL L. SWALM, JOHN J. SILCHIA, EDWARD F. BURKE, JR., KING M. TRIMBLE, SALVADORE CARPIO, CATHY DONOHUE, WILLIAM R. ROBERTS, THE HONORABLE WILLIAM H. MCNICHOLS, JR., MAYOR OF THE CITY OF DENVER, THE BUILDING DEPARTMENT OF THE CITY AND COUNTY OF DENVER, and JACK TANIGAWA, ACTING DIRECTOR OF THE CITY AND COUNTY OF DENVER,
Defendants-Appellees.

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION INC. and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Harsh Investment Corp.,[1] appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Colorado affirming the judgment of the District Court, City and County of Denver, State of Colorado, dismissing appellant's claims, entered herein on December 2, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

HOLME ROBERTS & OWEN
JEFFREY A. CHASE (#5203)

/s/ Jeffrey A. Chase
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

Attorneys for Appellant

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[1] The following are subsidiaries of Harsh Investment Corporation: Claremont Hotel Corporation; Fountain Gallery of Art, Inc.; The Fountain Fine Arts, Inc.; Harsh Building Co.; King Tower, Inc.; MacArthur/Broadway, Inc.; Public Service Agency Co.; Regency Tower Corp.; and Harsh Colorado Corp.

Harsh Investment Corporation is a general partner in the following: Harsh Realty Co.; and Clay Tower Apartments.

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, J. Preston Stieff, depose and say that I am an attorney in the office of Holme Roberts & Owen, attorney of record for Harsh Investment Corporation, appellant herein, and that on March 2, 1987, pursuant to Rule 28.3, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the following by placing the same in the United States Mail, postage prepaid, properly addressed to:

Susan E. Burch
Charles E. Norton
Calkins, Kramer, Grimshaw & Harring
1700 Lincoln Street, Suite 3800
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Paul W. Schluach
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Rothgerber, Appel & Powers
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Denver, Colorado 80202

Jane Ann Murphy
900 South Broadway
P.O. Box 5887
Denver, Colorado 80217

All parties required to be served have been served.

/s/ J. Preston Stieff

Subscribed and sworn before me on March 2, 1987.

/s/ Cheryl Graham
Notary Public

My commission expires: March 7, 1990.

APPENDIX F

BUILDINGS AND BUILDING REGULATIONS

ARTICLE IV. RESTRICTIONS ON STRUCTURES WITHIN AREAS NECESSARY TO PRESERVE MOUNTAIN VIEWS

Sec. 10-56. Purpose.

Upon consideration of a recommendation that an ordinance be enacted for the purpose of preserving and protecting the health, safety and general welfare of the people of the city and their property therein situate, the council finds:

(1) That the protection and perpetuation of certain panoramic mountain views from various parks and public places within the city is required in the interests of the prosperity, civic pride and general welfare of the people;

(2) That it is desirable to designate, preserve and perpetuate certain existing panoramic mountain views for the enjoyment and environmental enrichment of the citizens of the community and visitors hereto;

(3) That the preservation of such views will strengthen and preserve the municipality's unique environmental heritage and attributes as a city of the plains at the foot of the Rocky Mountains;

(4) That the preservation of such views will foster civic pride in the beauty of the city;

(5) That the preservation of such views will stabilize and enhance the aesthetic and economic vitality and values of the surrounding areas within which such views are preserved;

(6) That the preservation of such views will protect and enhance the city's attraction to tourists and visitors;

(7) That the preservation of such views will promote good urban design;

(8) That regular specified areas constituting panoramic views should be established by protecting such panoramic views from encroachment and physical obstruction.

(Code 1950, § 645.1)

Sec. 10-57. Prohibitions.

No land shall be used or occupied and no structure shall be designed, erected, altered, used or occupied except in conformity with all regulations established in this article and upon performance of all conditions herein set forth.

(Code 1950, § 645.3-1)

Sec. 10-58. Cranmer Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand four hundred thirty-four (5,434) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the at-

tached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand four hundred thirty-four (5,434) feet above mean sea level and established at the mountain view indicator in Cranmer Park, which point is identified on the attached map and which point is indicated in the aforesaid Cranmer Park by a cross set in the top step of the aforesaid mountain view indicator.

(Code 1950, § 645.4-1)

Sec. 10-59. Chessman Park—Botanic Gardens.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred eighty-three (5,383) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand three hundred eighty-three (5,383) feet above mean sea level and established at the flag pole at the Denver Botanic Gardens Overlook, which point is identified on the attached map.

(Code 1950, § 645.4-2)

Sec. 10-60. Ruby Hill Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred fifty-four (5,354) feet above mean sea level plus one and seven-tenths feet for each one hundred (100) feet that the part of a structure horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* A point having an elevation of five thousand three hundred fifty-four (5,354) feet above mean sea level, which point is identified on the attached map, at which point is located a steel rod set in concrete and which reference point is located as follows: Beginning at the southeast corner of the southwest quarter of the northeast quarter of Section 21, Township 4 South, Range 68 West; thence westerly along the land line a

distance of ten (10) feet; thence sighting west turn an angle of 90° 01′ 45″ to the north and a distance of eight and sixty one-hundredths (8.60) feet to the range point at the corner of West Florida Avenue and South Lipan Street; thence from that range point sighting west at an angle to the left of 38° 46′ 30″ for a distance of four hundred ninety and fifteen one-hundredths (490.15) feet.

(Code 1950, § 645.4-3)

Sec. 10-60.5. State Home Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching and as described in section 10-60.5(c)(2) shall be and hereby is determined to be and is designed as an area necessary for the preservation of a certain panoramic view to accomplish the purposes set forth in section 10-56. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred twenty-four and eight hundred seven thousandths (5,324.807) feet above mean sea level plus one and sevent-tenths (1.7) feet for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Definitions of terms used.*

(1) *Reference point*: A point having an elevation of five thousand three hundred twenty-four and eight

hundred seven thousandths (5,325.807) feet above mean sea level, which point is identified on the attached map, at which point is located a brass cap set in concrete, and which point is located approximately six hundred seventy (670) feet east of the center line of South Logan Street and five hundred thirty (530) feet south of East Iliff Avenue.

(2) *Area designation*: An area enclosed by a line drawn from the reference point southerly to the center line of Yale Avenue and South Pearl Street, thence westerly along the Yale Avenue center line to the eastern boundary of the Ruby Hill mountain view designated area, hence northerly along the eastern boundary of the Ruby Hill mountain view designated area to the center line of West Evans Avenue, thence easterly along the center line of West Evans Avenue to the center line of the South Platte River, thence southeasterly to the reference point.

(Ord. No. 33-83, § 1, 1-24-83)

Sec. 10-61. State Capitol Area.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand two hundred eighty-six (5,286) feet above mean sea level plus one and seven-tenths feet for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever

a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand two hundred eighty-six (5,286) feet above mean sea level, which point is located at the midpoint of the top step on the westerly exposure of the capitol of the state.

(Code 1950, § 645.4-4)

Sec. 10-61.5. Washington Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading and crosshatching and as described in section 10-61.5(c)(2) shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view to accomplish the purposes set forth in section 10-56. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of any structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred twenty-three and nine-tenths (5,323.9) feet above mean sea level plus one foot for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of the section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Definitions of terms used.*

(1) *Reference point*: A point having an elevation of five thousand three hundred twenty-three and nine-tenths (5,323.9) feet above mean sea level located one hundred thirty (130) feet north and one hundred thirty (130) feet west of the intersection of the center lines of South Franklin Street and East Arizona Avenue at which point is located a brass cap set in concrete. Said point is identified on the attached map.

(2) *Area designation*: An area enclosed by a line drawn from the reference point southwesterly to the center lines of West Asbury Avenue and the South Platte River, thence northerly along the South Platte River center line to the West Florida Avenue center line, thence westerly along the West Florida Avenue center line to the center line of the South Lipan Street, thence northerly along the South Lipan Street center line to the center line of West Alameda Avenue, thence easterly along the West Alameda Avenue center line to the center line of South Logan Street, thence southeasterly to the reference point.

(Ord. No. 34-83, § 1, 1-24-83)

Sec. 10-62. City Park—Natural History Museum.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by

shading or crosshatching shall exceed an elevation of five thousand three hundred three and ninety-three one-hundredths (5,303.93) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand three hundred three and ninety-three one-hundredths (5,303.93) feet above mean sea level and established as a point approximately two thousand seven hundred (2,700) feet north and one thousand (1,000) feet west of the southeast corner of Section 36, Township 3 south, Range 68 west of the 6th Principal Meridian, City and County of Denver, State of Colorado, more particularly described as follows: Such reference point is 198 feet south and 69 feet west of the northernmost west corner of the Museum of Natural History Building. At the reference point is a standard brass disc set in a concrete walkway, and is three (3.0) feet east of the west edge of said walkway. Such point is identified on the attached map.

(Code 1950, § 645.4-5)

Sec. 10-62.5. Southmoor Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view to accomplish the purposes set forth in section 10-56. The restrictive provisions of this article shall be in full force

and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level plus two (2) feet for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* The reference point is a point having an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level, which point is identified on the attached map, at which point is located the bronze marker set in concrete in the vicinity of Southmoor Park sign set in concrete and which references point is located as follows: A line from reference point at Southmoor Park to center line of Quincy Avenue and center line of Happy Canyon Road, along center line of Happy Canyon Road to center lines of Happy Canyon Road, Hampden Avenue and Dahlia Street, north along center line of Dahlia Street to center line of Yale Avenue, east along Yale Avenue to Monaco Street Parkway center line from a point at center line of Monaco Street Parkway and Yale Avenue center line back to reference point at Southmoor Park.

(d) *Exceptions.*

(1) Allowable height. Within any district zoned for business a structure which, under the terms of the section 10-62.5 would be limited, may be constructed to a height of forty-two (42) feet above the natural grade.

(2) Current uses. Any currently existing structure which would not be in compliance with this section may be replaced as necessary for its current height and use.

(Ord. No. 376-82. § 1, 7-19-82; Ord. No. 341-84, § 1, 7-2-84)

Editor's note—Ord. No. 376-82, § 1, adopted July 19, 1982, added § 645.4-6 to the 1950 Code; at the editor's discretion these provisions have been included as § 10-62.5.

Sec. 10-63. Enforcement.

(a) This article shall be enforced by the director of building inspection. The director is hereby empowered to enter into and cause any building, other structure or tract of land to be inspected and examined and to order in writing the remedy of any condition found to exist thereon or thereat in violation of any provision of this article. Service of the order shall be by personal service upon the owner, authorized property management agent, agent, occupant or lessee or, alternatively, service may be made upon such persons by certified mail. If such persons are not found, the order may be served by posting in a conspicuous place on the premises, in which event service shall be deemed complete as of the moment of posting.

(b) No oversight or dereliction on the part of the director of building inspection or on the part of any official or employee of the city shall legalize, authorize or excuse any violation of any provision of this article.

(Code 1950, § 645.2)

Sec. 10-64. Violations.

Any person or any officer, agent, member, servant or employee thereof, or any lessee or occupant of premises who violates, disobeys, omits, neglects or refuses to com-

ply with the provisions of this article, shall be guilty of violation thereof; and every omission, neglect or continuance of the thing commanded or prohibited for twenty-four (24) hours shall constitute a separate and distinct offense; provided, however, without affecting any penalty for a violation, no proceedings shall be instituted hereunder against an occupant who is not the owner, or against an agent, servant, employee or lessee for any violations hereof until after the expiration of ten (10) days from the date of the service of a notice by the director of such building inspection to cease and desist such violation, such notice to be served as provided in section 10-63.

(Code 1950, § 645.3-2)

Sec. 10-65. Remedies.

(a) Any person violating any provision of this article shall be subject to the penalties provided by section 1-13.

(b) In addition to any penalty the city or any person aggrieved by any violation of this article may maintain any appropriate action to prevent and restrain the violation including an action for injunctive relief and may apply for a temporary restraining order without posting bond.

(Code 1950, § 645.3-3)

Secs. 10.66-10.80. Reserved.